Federal Court  Cour fédérale

Date: 20230926

Dockets: IMM-11284-23
IMM-11737-23

Citation: 2023 FC 1302

Vancouver, British Columbia, September 26, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BLESSING CHINEDU NWAORGU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicant, Blessing Chinedu Nwaorgu, brings a motion for a stay of his removal from Canada, scheduled to take place on September 28, 2023.

[2] The Applicant requests that this Court order a stay of his removal until the determination of underlying applications for leave and judicial review of the decisions refusing his deferral of removal and application for permanent residence on humanitarian and compassionate ("H&C") grounds.

[3] For the reasons that follow, this motion is dismissed. I find that the Applicant has not met the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decisions**

[4] The Applicant is a 47-year-old citizen of Nigeria. He has three children, all of whom reside in Canada.

[5] In March 2018, the Applicant, his then-wife, and their three children entered Canada and initiated claims for refugee protection. The Refugee Protection Division ("RPD") denied their claims in a decision dated August 30, 2019. The Refugee Appeal Division ("RAD") dismissed the Applicant's appeal of the RPD's decision in a decision dated February 2, 2020. This Court dismissed the Applicant's application for leave and judicial review of the RAD's decision on May 17, 2021.

[6] On August 5, 2021, the Applicant submitted an H&C application for permanent residence. This application was refused on December 20, 2021.

[7] On February 3, 2022, the Applicant and his then-wife were granted a divorce.

[8] On April 2, 2022, the Applicant submitted a further H&C application.

[9] On August 4, 2022, the Applicant submitted an application for a Pre-Removal Risk Assessment ("PRRA").

[10] The Applicant remarried and on February 20, 2023, the Applicant filed a spousal sponsorship application for permanent residence. It was returned to him twice for incompleteness and on June 3, 2023, the application was accepted for processing.

[11] On August 9, 2023, the Applicant was advised that his H&C application and PRRA assessment had been refused. On August 23, 2023, the Applicant received a Direction to Report for removal, scheduled for September 28, 2023.

[12] On August 30, 2023, the Applicant submitted a request for deferral of removal. In a letter dated September 6, 2023, this request was refused.

[13] On September 7, 2023, the Applicant filed an application for leave and judicial review of the negative H&C decision. On September 18, 2023, the Applicant filed an application for leave and judicial review of the negative deferral of removal.

III. **Analysis**

[14] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v*

Metropolitan Stores Ltd., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp,* 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[15] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[16] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited. The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 at para 67) ("*Baron*").

[17] A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[18] On this first prong of the tri-partite test, the Applicant submits that the underlying application for judicial review of the deferral request raises issues about the Officer unreasonably misapprehending the consequences of the removal for his pending spousal sponsorship application. The Applicant submits that the underlying application for judicial review of the H&C decision raises the issue of the Applicant not receiving due credit for his work as a frontline worker during the height of the COVID-19 pandemic, despite the reasons not having yet been provided for this decision.

[19] The Respondents submit that there are no serious issues, arguing that the Officer reasonably refused to defer the Applicant's removal on the basis that the Officer had a limited scope to defer the refusal, the Applicant has not met the high threshold for establishing a serious issue in a deferral refusal, and that his pending spousal sponsorship application does not constitute a ground for deferring removal. The Respondents submit that the Applicant's arguments about the H&C decision do not constitute a serious issue as the Applicant's arguments are without merit and speculative.

[20] Having reviewed the parties' motion materials, I agree that there is no serious issue to be tried for either of the Applicant's underlying applications.

[21] On the deferral of removal application, the Applicant has provided insufficient evidence that the Officer unreasonably misapprehended the consequences of the removal for his spousal sponsorship application. The Applicant has not furnished sufficient evidence that he cannot apply for a new overseas application nor be unable to return to Canada at the time the current

sponsorship application is finalized. It must be recalled that migrants do not have an unqualified right to enter or remain in Canada (*Medovarski v Canada (Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46) and the Applicant cannot rely upon a stay of removal motion to await the outcome of a sponsorship application that could take many more months, and which is not necessarily rendered moot by his departure. I find that he has not established a serious issue to be tried in regards to the elevated standard of the first *Toth* requirement.

[22] On the H&C application, I agree with the Respondents that the Applicant has not led any evidence to support his contention that the H&C decision did not give him due credit for his work as a frontline worker during the COVID-19 pandemic. I agree that the moral debt owed to immigrants working on the frontline that time cannot be overstated (*Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 at para 43), but I have no evidence before me about how or whether this debt was acknowledged in the Applicant's H&C decision. Lacking this evidence, I cannot find a serious issue to be tried.

B. *Irreparable Harm*

[23] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of*

Employment and Immigration), [1994] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada (CA)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[24] The Applicant submits that he will suffer irreparable harm if returned to Nigeria as, if removed, there is no way to know if or when he will see or be in contact with his children again. He further submits that removal of a frontline worker during the COVID-19 pandemic would cause irreparable to Canada's reputation on the international stage.

[25] The Respondents submit that the Applicant's separation from his family does not constitute irreparable harm and the Applicant's contention that he will not be able to return to Canada is speculative.

[26] The failure to establish a serious issue is determinative of this motion. Nonetheless, irreparable harm is not made out. I note first that the Applicant leads no evidence to establish that Canada's international reputation will be damaged by this removal, and in any event, the country of Canada itself is not the applicant in this matter seeking to establish irreparable harm.

[27] While I am sympathetic to the Applicant's circumstances, especially in light of his children having no means of visiting Nigeria and returning to Canada, I do not find sufficient evidence to establish that he is or would be inadmissible to Canada, nor that he could not remain in contact with his children. I acknowledge the letter stating that his ex-wife has been uncooperative during the divorce proceeding, but I do not find that this letter establishes that his ex-wife would refuse to facilitate and encourage video calls between the Applicant and his

children and that he will lose contact with them. Furthermore, the case of *Setireki v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 42225 (FC) provided by the Applicant in support of his contention is distinguishable from this matter. There, the Applicant was charged with criminal harassment of his wife and convicted of impaired driving under the *Criminal Code*, RSC 1985, c C-46, and the Court anticipated he would be found inadmissible to Canada and unable to return to see his family. Here, no such inadmissibility concerns exist. I agree with the Respondents that the Applicant's concerns about being unable to return to Canada are speculative. Absent evidence of there being a more severe and prolonged severance demonstrated between the Applicant and his children upon his removal, irreparable harm is not established.

C. *Balance of Convenience*

[28] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd* at 129). It has sometimes been said, "Where the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[29] The Applicant submits that the serious nature of the irreparable harm faced far outweighs any convenience the Ministers may have in removing the Applicant, even if an applicant has unclean hands, where the irreparable harm relates to the best interests of the children.

[30] The Respondents submit that the balance of convenience favours the Minister, as the Applicant merely seeks to preserve the status quo until additional administrative processes can be undertaken or the underlying application for judicial review can be disposed of, which are insufficient reasons for finding the balance of convenience favouring the Applicant. The Respondents further submit that the Applicant has failed to show a public interest not to remove him.

[31] The failure to meet the first two prongs of the test is determinative of this motion. Nonetheless, the balance of convenience weighs in favour of the Respondents. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, states that removal orders must be enforced as soon as possible. The balance of convenience favours the Ministers in enforcing the removal order expeditiously to protect the integrity of the Canadian immigration system, given that the Applicant has had numerous immigration applications made and dismissed, and has failed to establish that he would face irreparable harm upon removal to Nigeria.

[32] Ultimately, the Applicant did not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-11284-23 and 11737-23

THIS COURT ORDERS that the Applicant's motion for a stay of removal is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Dov Maierovitz	FOR THE APPLICANT
Kevin Spykerman	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Dov Maierovitz Barrister and Solicitor Thornhill, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS